U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042.
Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 20 2006

EAC 04 229 50305

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting and applications development business that seeks to employ the beneficiary permanently in the United States as a senior applications developer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary of this petition and the multiple beneficiaries of other petitions filed by the petitioner the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The director also concluded that the petitioner had not demonstrated that the beneficiary had sufficient post baccalaureate experience prior to the priority date.

The petitioner filed the appeal. Subsequently, counsel submits a brief and additional evidence, including employment letters and amended tax returns. The employment letters demonstrate sufficient employment to meet the requirements of the labor certification as of the priority date. Thus, the beneficiary's experience is no longer at issue. The tax returns will be addressed below.

Counsel did not previously represent the petitioner and, thus, submits a Form G-28, Notice of Entry of Appearance as Attorney or Representative listing a Texas address for the petitioner. The labor certification and petition were filed using a Connecticut address. This change in address raises the issue of whether or not the entity represented on the new Form G-28 is the same entity that filed the petition or, if not, whether it is a successor in interest.[1] Only a company that meets the successor-in-interest requirements set forth in *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) can use a labor certification filed by another entity. The new address also raises the question of whether the original job offer is still available.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

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[1] According to publicly available Connecticut records on the Internet at www.concord.sots.ct.gov, the petitioner is active in Connecticut but has not filed an annual report since March 2002. According to publicly available Texas records on the Internet at http:\ecpa.cpa.stat.tx.us, the petitioner is not in good standing in Texas.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 24, 2001. The proffered wage as stated on the Form ETA 750 is $70,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date in 1999, a gross annual income of $391,871 and a net loss. The petitioner did not indicate how many employees it has. In support of the petition and in response to a request for additional evidence, the petitioner submitted its 2001, 2002 and 2003 Form 1120 Corporate tax returns. The tax returns, prepared by an accounting firm, reflect the following information for the following years:

	2001	2002	2003
Net income[2]	$70,233	($17,854)	($651)
Current Assets	$1,116	$1,046	$5,491
Current Liabilities	$11,020	$1,094	$843
Net current assets	($9,904)	($48)	$4,648

In addition, the petitioner submitted copies of bank statements for various months in 2001, 2002, 2003 and 2004. The statements show balances between $1,312.42 (February 28, 2002) and $51,689.86 (October 31, 2001), with most months showing only a few thousand dollars.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage to the beneficiary.

On appeal, the petitioner submits amended tax returns prepared by an independent accountant, [redacted]who submits a letter in support of the appeal. The amended tax returns do not increase the petitioner's net income. Rather, the petitioner relies on net current assets to establish an ability to pay the beneficiary the full proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001, 2002 or 2003.

[2] Before net operating loss deduction and special deductions.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. We concur with the director that the petitioner's net income cannot establish its ability to pay the proffered wage.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

In his letter, submitted on appeal, Mr. [redacted] states that the amended returns have been prepared using a "hybrid" analysis, allowing certain items to be calculated using the cash basis and others to

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

be calculated using the accrual basis. The petitioner submits copies of amended returns for those years, stamped as received by the Internal Revenue Service. On the amended returns, the petitioner has claimed the following amounts:

	2001	2002	2003
Other current assets	$174,536	$187,278	$107,449
Current liabilities	$49,020	$5,595	$3,118
Net current assets	$125,516	$181,683	$104,331

As is clear, the petitioner has altered its total assets and liabilities. The accountant does not explain where this extra money came from except to assert that the taxes are now prepared using a "hybrid" accounting method. We note that amended returns do not amend Schedule K, line one. Specifically, all of the Schedules K-1 in the record, including those submitted on appeal, reveal that the returns were prepared using the cash methods. Mr. [redacted] did not check "Accrual" or "Other," which requires the preparer to specify the method used. Mr. [redacted] has not explained why his "hybrid" method would fall under "cash" instead of "other."

According to the instructions for Tax Form 3115, "a Form 3115 must be filed by or on behalf of each applicant seeking consent to change an accounting method." The record contains no evidence that the petitioner filed this form, seeking permission to change accounting methods.

The petitioner's choice of tax accounting methods accords income either to the year during which it was earned or the year during which it was received. The accountant implies that the petitioner has reported income when it is received, consistent with cash convention, but urges that the amount on the tax return be amended to include income earned during a given fiscal year but not received during that year, which would be consistent with accrual. The petitioner's choice of accounting methods has attributed income to various years as appropriate, and those amounts may not now be shifted to other years as convenient to the petitioner's present purpose. Changing from the cash method to the accrual method may change the year-to-year distribution of the petitioner's current assets, but the petitioner has not demonstrated that changing from cash to accrual method would make available tens of thousands of dollars that would otherwise never have appeared on the tax return at all.

Our position is consistent with the business reference available at www.referenceforbusiness.com, which provides that while switching accounting methods generally results in adjustments to taxable income, not shown in this matter, "changing accounting methods does not permanently change the business' long-term taxable income, but only changes the way that income is recognized over time."

The petitioner has presented two vastly different pictures of its current assets, with no documentation to show why the second version is more credible than the first. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988).

The petitioner has not shown that the amended tax returns are more credible than the original returns. The petitioner has failed to submit credible evidence sufficient to demonstrate that it had the continuing ability to pay the proffered wage beginning on the priority date.

Finally, we note that the petitioner has filed Form I-140 petitions in behalf of six[4] other beneficiaries with priority dates in 2001. Even accepting the net current assets claimed on appeal, which we do not, the petitioner has not demonstrated an ability to pay all of these beneficiaries.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[4] The petitioner withdrew two additional immigrant petitions.